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No. 91-1084

In the Supreme Court of the United States

October Term, 1991

Patricia Cotlow, et al.,

Appellants,

v.

James Emison, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

Does the Anti-Injunction Act permit a federal court to enjoin a state court from adjudicating challenges to a state's legislative and congressional districts?

Should a federal court defer to a state court where parallel actions are pending in each court challenging a state's legislative and congressional districts?

Does the All Writs Act authorize a federal court to enjoin completion of a previously commenced state court action which is about to reach a final judgment redistricting the state Legislature in accordance with state and federal constitutional provisions and standards?

LISTING OF ADDITIONAL PARTIES

Appellants

Philip Krass, Sharon LaComb, James Stein, and Theodore Suss, individually and on behalf of all citizens of Minnesota similarly situated; Joan Growe, Secretary of State of the State of Minnesota; Patrick O'Connor, Hennepin County Auditor, individually and on behalf of all County Auditors of the State of Minnesota; the Seventy-seventh Minnesota State House of Represenatives; and the Seventy-seventh Minnesota State Senate.

Appellees

Judy Fairbanks, Marie Iverson, Ken Dean, Steve Castillo, Lew Freeman, and Yao Lo, individually and on behalf of all Citizens and Voters of the State of Minnesota similarly situated; Duane Benson, Terry Dempsey, Delores Hettig, Richard Harmon, David E. Peterson, E.M. Patricia Pidcock, and Frank Ringsmuth; and Mark Lundgren, Carver County Auditor, individually and on behalf of all County Auditors of the State of Minnesota.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. _____

PATRICIA COTLOW, ET AL.,

Appellants,

vs.

JAMES EMISON, ET AL.,

Appellees.

On Appeal from the United States District Court for the District of Minnesota

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CITATION TO OPINION BELOW

The December 5, 1991, Order of Stay of All Proceedings Pending Before the Minnesota Special Redistricting Panel in *Cotlow v. Growe*, No. C8-91-985, issued by the three-judge federal court is not officially reported. It was filed in the United States District Court for the District of Minnesota, Fourth Division, as Civil File Number 4-91-202, and is set forth in the accompanying Appendix at App. A-1.

JURISDICTION

The Order of Stay and the Judgment appealed from were filed on December 5, 1991. Jurisdiction is conferred upon this Court pursuant to 28 U.S.C. § 1253.

CONSTITUTIONAL PROVISIONS INVOLVED

The Tenth Amendment to the United States Constitution provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

The Minnesota Constitution, article IV, section 2, provides:

> The number of members who compose the senate and house of representatives shall be prescribed by law. The representation in both houses shall be apportioned equally throughout the different sections of the state in proportion to the population thereof.

The Minnesota Constitution, article IV, section 3, provides:

> At its first session after each enumeration of the inhabitants of this state made by the authority of the United States, the legislature shall have the power to prescribe the bounds of congressional and legislative districts. Senators shall be chosen by single districts of convenient contiguous territory. No representative district shall be divided in the formation of a senate district. The senate districts shall be numbered in a regular series.

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1651(a) provides:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

28 U.S.C. § 2283 provides:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

42 U.S.C. § 1973 provides:

(a) No voting qualification or prerequisite to

> voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

Minnesota Statutes, section 202A.14, subdivision 1, provides in pertinent part:

> At 7:30 p.m. on the first Tuesday after the first Monday in March in every state general election year there shall be held for every election precinct a party caucus in the manner

provided in sections 202A.14 to 202A.19. . . .

Minnesota Statutes, section 204B.135, subdivision 1, provides:

> A city that elects its council members by wards may not redistrict those wards before the legislature has been redistricted in a year ending in one or two. The wards must be redistricted within 60 days after the legislature has been redistricted or at least 19 weeks before the state primary election in the year ending in two, whichever is first.

Minnesota Statutes, section 204B.135, subdivision 2, provides:

> For purposes of this subdivision, "local government election district" means a county district, park and recreation district, school district, or soil and water conservation district. Local government election districts, other than city wards covered by subdivision 1, may not be redistricted until precinct boundaries are reestablished under section 204B.14, subdivision 3, paragraph (c). Election districts covered by this subdivision must be redistricted within 80 days of the time when the legislature has been redistricted or at least 15 weeks before the state primary election in the year ending in two, whichever comes first.

Minnesota Statutes, section 204B.14, subdivision 1a, provides:

> It is the intention of the legislature to complete congressional and legislative

> redistricting activities in time to permit counties and municipalities to begin the process of reestablishing precinct boundaries as soon as possible after the adoption of the congressional and legislative redistricting plans but in no case later than 25 weeks before the state primary election in the year ending in two.

Minnesota Statutes, section 204D.03, subdivision 1, provides in pertinent part:

> The state primary shall be held on the first Tuesday after the second Monday in September in each even-numbered year. . . .

LEGISLATIVE RESOLUTION INVOLVED

House Concurrent Resolution No. 2 of the Seventy-seventh Minnesota State Legislature provides:

> A plan presented to the Senate or House of Representatives for redistricting seats in the Senate and House of Representatives must adhere to the following standards:
>
> (1) The Senate must be composed of 67 members. The House of Re presentatives must be compose d of 134 members.
>
> (2) Each district is entitled to elect a single member.
>
> (3) A representative district may not be divided in the formation of a senate district.

(4) The districts must be substantially equal in population. The population of a district must not deviate from t he ideal by more than two perc ent, plus or minus.

(5) The districts must be composed of convenient contiguous territory. To the extent consistent with the other standards in this resolution, districts should be compact. Contiguity by water is sufficient if the water is not a serious obstacle to travel within the district.

(6) The districts must be numbered in a regular series, beginning with House district 1A in the northwest corner of the state and proceeding across the state from west to east, north to south, but bypassing the seven-county metropolitan area until the southeast corner has been reached; then to the seven-county metropolitan area outside the cities of Minneapolis and St. Paul; then in Minneapolis and St. Paul.

(7) The districts must not dilute the voting strength of racial or language minority populations. Where a concentration of a

racial or language minority makes it possible, the districts must increase the probability that members of the minority will be elected.

(8) A county, city, or town should not be divided into more than one district except as necessary to meet equal-population requirements or to form districts that are composed of convenient contiguous territory.

(9) The districts should attempt to preserve communities of interest where that can be done in compliance with the preceding standards.

(10) The geographic areas and population counts used in maps, tables, and legal descriptions of the districts must be those used by the Legislative Coordinating Commission's Subcommittee on Redistricting.

The Subcommittee on Redistricting will notify the President of the Senate and the Speaker of the House of Representatives when the necessary 1990 census data has been received from the United States Census Bureau, loaded into the Subcommittee's computerized redistricting system, and verified as ready for use in redistricting. A redistricting plan will not be considered for adoption by the Senate or

House of Representatives until the notice has been given.

STATEMENT OF THE CASE

Since early 1991, actions have been pending i the Minnesota District Court and in the United States District Court for the District of Minnesota challenging the constitutionality of Minnesota's legislative and congressional districts in light of population shifts reflected in the 1990 Census. After the Minnesota Legislature enacted a new legislative redistricting plan in May 1991, challenges were added in both actions to the constitutionality of the new law. Both courts proceeded to consider the constitutionality of the new redistricting law and to prepare to implement their own legislative and congressional redistricting plans. On December 5, 1991, the federal court enjoined all proceedings in the state court redistricting action and this appeal ensued.

On January 24, 1991, Appellants Patricia Cotlow, Phillip Krass, Sharon LaComb, James Stein, and Theodore Suss (the "*Cotlow* Plaintiffs") commenced an action in the district court of Hennepin County, Minnesota, seeking a declaratory judgment that the legislative redistricting plan adopted in *LaComb v. Growe*, 541 F. Supp. 160 (D. Minn. 1982), enacted with corrections as Minn. Laws 1983, chapter 191, (codified as Minn. Stat. §§ 2.019 and 2.042-2.702) and the congressional redistricting plan adopted in *LaComb v. Growe*, 541 F. Supp. 145 (D. Minn. 1982), *aff'd sub nom. Orwoll v. LaComb*, 456 U.S. 966 (1982), violate both the Minnesota Constitution and the United States Constitution. The complaint asks that Secretary of State Joan Growe, the Hennepin County Auditor, and all Minnesota county chief election officers be enjoined from conducting elections under the old plans. The complaint further asks that the court retain jurisdiction until the end of the legislative session to determine the validity of any new legislative or congressional

redistricting plans that might be enacted, and in the absence of enactment of constitutionally valid plans, to draw the necessary plans itself.[1]

On March 18, 1991, the Appellees James Emison, Judy Fairbanks, Marie Iverson, Ken Dean, Steve Castillo, Lew Freeman, and Yao Lo (the "*Emison* Plaintiffs") filed their complaint in this action, invoking federal jurisdiction under 28 U.S.C. §§ 1331, 1343(a)(3)-(4), 2201, 2202, and 2284; and 42 U.S.C. §§ 1973, 1983, and 1988. The complaint seeks essentially the same relief as demanded by the *Cotlow* Plaintiffs in the state action, but it also asks the court to declare that the legislative plan drawn by the federal court in 1982 and adopted by the Minnesota Legislature in 1983 violates the Voting Rights Act and require that any new legislative plan drawn by the federal court maximize the voting strength of certain minority populations.[2]

On April 8, 1991, a three-judge panel was appointed in the federal action under 28 U.S.C. § 2284(a). It is composed of Circuit Chief Judge Donald P. Lay, District Judge Harry H. MacLaughlin, and District Judge Paul A. Magnuson.

On May 29, 1991, S.F. No. 1571, chapter 246, prescribing the boundaries of legislative districts, became a law of the state of Minnesota without the signature of the Governor. *Seventy-seventh Minnesota State Senate v. Carlson*, No. C3-91-7547 (Minn. Dist. Court, 2d Judicial

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[1] The Minnesota House of Representatives, the Minnesota Senate, and a group of plaintiffs were later permitted to intervene in the state court action.

[2] The Minnesota House of Representatives, the Minnesota Senate, the Hennepin County Auditor, and the plaintiffs from the state court action were later permitted to intervene in the federal court action.

Dist., Aug. 2, 1991); Minn. Laws, 1991, chapter 246. It was uniformly recognized that chapter 246 contained defects in its descriptions of district boundaries. For instance some districts, read literally, were incoherent and others were discontiguous.[3]

On June 4, 1991, the Minnesota Supreme Court appointed a three-judge panel to preside over the state court redistricting action. The state court panel is composed of a judge of the Court of Appeals and two judges of the District Court. App. A-104.

The state court scheduled its first pretrial conference for July 26, 1991. The federal court then set its first pretrial conference for July 22. All parties and both courts agreed that it would be desirable to complete legislative and congressional redistricting well before precinct caucuses scheduled for March 3, 1992. *See* Minn. Stat. § 202A.14, subd. 1. They agreed it would be desirable to allow time, not only for the Legislature to enact plans, but also for a court to review any plans enacted or to adopt a plan if the Legislature failed to enact one, and for appeals from the decisions of the district courts to be completed before March 3, 1992.

On August 9, 1991, Appellees Duane Benson, Terry Dempsey, Delores Hettig, Richard Harmon, David E. Peterson, E.M. Patricia Pidcock, and Frank Ringsmuth (the "*Benson* Plaintiffs") filed suit in the United States District

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[3] Appellants have maintained that the courts' role in reviewing chapter 246 is limited to ascertaining its meaning and making only those changes to the law which are necessary to correct its defects. *E.g., Upham v. Seamon*, 456 U.S. 37 (1982) (per curiam); *White v. Weiser*, 412 U.S. 783 (1973). Other parties have maintained that the defects require the courts to draw their own plans without regard to chapter 246.

Court for the District of Minnesota. They seek a declaration that chapter 246 is an invalid plan of legislative apportionment on the following grounds:

1. Excessive population deviations among the districts violate the Fourteenth Amendment to the Constitution of the United States, the Constitution of Minnesota, the concurrent resolution adopted by the Senate and House of Representatives establishing standards for legislative redistricting plans, standards of past legislative redistricting plans, and standards required by good public policy.

2. Districts composed of noncontiguous territory violate Article IV, § 3, of the Minnesota Constitution.

3. House districts that are not nested within senate districts violate Article IV, § 3, of the Minnesota Constitution.

4. Dozens of other flaws, errors, mistakes, and defects, such as district descriptions referring to counties, cities, and streets that do not exist and directions that cannot be followed, make it impossible for the Secretary of State to hold an election under the districts described in the law.

The complaint does not allege that chapter 246 violates the Voting Rights Act.

On August 21, 1991, the federal court issued a Memorandum Opinion and Order that denied motions of the Minnesota Legislature and the Secretary of State for the federal court to abstain pending further proceedings in the state court, denied a motion of the *Emison* Plaintiffs to stay proceedings in the state court, and granted a motion of the Legislature for the federal court to abstain pending further proceedings in the Legislature. The federal court said that:

> In light of the time constraints and the important federal rights at stake, we should not abstain and defer to the state courts. Under the circumstances, it would be difficult for the state judicial processes, including the Minnesota Supreme Court, to approve the new legislative plan by March, 1992. Even assuming the state court continues to exercise its jurisdiction over the case, whatever plan that it approves would have to be reviewed by this court in terms of the challenges made to the plan under Section 2 of the Voting Rights Act.

App. A-49.

On August 27, 1991, intervening plaintiffs in the state court action filed their Complaint in Intervention. The complaint alleges that chapter 246 "does not meet constitutional and other requirements." App. A-118.

On October 1, 1991, after its initial review of chapter 246, the state court issued its Pretrial Order No. 4, finding that chapter 246 contains "numerous infirmities, including noncontiguous districts" under both the Minnesota Constitution, Article IV, §§ 2 and 3, and the Fourteenth Amendment to the United States Constitution. App. A-139. Because no party submitted specific allegations of Voting

Rights Act violations in the state court action, the state court ordered submission of any alleged violations by October 7, 1991, without waiver of jurisdictional objections. No violations of the Voting Rights Act were asserted. App. A-164.

On November 21, 1991, after completing its review of chapter 246 and in accordance with the schedule set forth in its earlier orders, the state court issued an order holding that:

> Most of the constitutional and statutory defects in Minnesota Laws 1991, Chapter 246 can be cured by ascertaining and effectuating the legislative intent *see* Minn. Stat. § 645.16 (1990); and by applying canons of statutory construction, Minn. Stat. §§ 645.16 through 645.43 (1990).

App. A-167 to A-168. The state court concluded that "Chapter 246 contains no Federal Voting Rights Act violation."

In its November 21, 1991 order, the state court indicated it had come to "an enduring realization that drawing accurate and verifiable legislative boundaries for Minnesota's 201 districts is a complex and time consuming operation." App. A-172. Accordingly, it issued its order in preliminary form, setting forth its resolution of the ambiguities in the state law and correcting what it found to be violations of the Minnesota and United States Constitutions. Annotations explaining its corrections were to be included in its final order. App. A-168.

The state court asked the parties to examine its preliminary order and identify any errors before a final hearing on December 3. The parties submitted numerous

suggestions for minor corrections and various suggestions to solve the problem of making the court's order sufficiently final to permit an immediate appeal to the Minnesota Supreme Court, while also making clear that the Legislature remained free to enact whatever changes it might choose. At a hearing on December 3, 1991, the state court announced its intention to issue its final order within a few days and to defer consideration of congressional redistricting plans until after the Legislature reconvened in its session scheduled for early January.

On December 4, 1991, the federal court held a hearing to consider the *Benson* Plaintiffs' motion for summary judgment which requested that chapter 246 be declared invalid. The parties were asked to identify the provisions of chapter 246 they considered to be unconstitutional. Various parties referred to the state court's preliminary order and to the fact that they expected the state court's final order to be issued within days and that they expected the state court's order would identify which provisions it believed to be unconstitutional and which provisions it believed could be corrected by construing the law under Minnesota principles of statutory construction. The federal court did not advise the parties that it was considering staying proceedings in the state court.

The next day, on December 5, 1991, the federal court issued its order staying all proceedings in the state court and enjoining state and county election officers, as well as the Legislature, from attempting to enforce or implement the state court's order. The order also stays all previous orders of the state court. App. A-14. Judge MacLaughlin dissented, saying "it seems clear to me that this Court has no legal authority to issue the injunction." App. A-18. Judgment was entered the day of the order.

On December 9, 1991, the state court issued its

Findings of Fact, Conclusions of Law, and Order for Judgment on Legislative Redistricting. This final legislative redistricting order was issued "subject to the stay issued by the United States District Court in *Emison*." App. A-272.

Appellants filed their Notice of Appeal on December 13, 1991. Jurisdiction is conferred on this Court by 28 U.S.C. § 1253 to review a decision of a statutory three-judge court upon appeal by any party from an order granting an injunction.

THE QUESTION PRESENTED IS SUBSTANTIAL

I. INTRODUCTION

The injunction issued by the federal three-judge panel has effectively transferred from the state courts to the federal courts the entire responsibility for reviewing challenges to Minnesota's legislative and congressional districts. It strikes at the heart of our federal system of justice, of which the state courts are an essential part. The federal court's blatant disregard in this case for the principles of federalism is an injustice that undermines the legislatures and courts in all fifty states.

If a federal court may stop the presses just as a state court's opinion is about to be published, there is no reason for a state court ever to begin the complex and time-consuming task of adjudicating state redistricting cases. If a federal court may enjoin a state court from construing a state redistricting law, only the federal courts will be left to construe redistricting provisions in state constitutions, state statutes, and state legislative resolutions, and only the federal courts will be left to construe and define state policy on redistricting.

Minnesota was one of the first dozen states to enact

a legislative redistricting plan after the 1990 census. NATIONAL CONFERENCE OF STATE LEGISLATURES, REAPPORTIONMENT LAW UPDATE, Summer Quarter 1991 at 5. It was the third state to have its 1991 redistricting plan reviewed by a state court, as this Court encouraged in *Scott v. Germano*, 381 U.S. 407 (1965).[4] Of nearly 90 challenges to legislative or congressional redistricting plans during the 1980s, about 30 were considered by the state courts. *See* NATIONAL CONFERENCE OF STATE LEGISLATURES, REAPPORTIONMENT UPDATE (April 1987). If the trend toward state court involvement in redistricting continues, there will be many more cases filed in the state courts, rather than in the federal courts, as the 1990s round of redistricting litigation progresses. The federal court's injunction would reverse that legitimate and desirable trend.

II. THE FEDERAL COURT'S INJUNCTION OF ALL STATE COURT PROCEEDINGS VIOLATES THE ANTI-INJUNCTION ACT.

The federal court did not have authority to enjoin the state court redistricting action. The federal court's order exceeds the boundaries established by Congress for our nation's dual federal and state court system and intrudes

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[4] The first two states to pass plans in 1991 and have them reviewed in state court were Texas, *Mena v. Richards*, No. C-454-91-F (332nd Judicial District, Hidalgo County, filed June 17, 1991); and Virginia, *Jamerson v. Anderson*, No. CH-91-000139-00 (Circuit Court of Halifax County, Virginia, filed June 24, 1991). Suits challenging legislative plans have also been filed in the state courts of Ohio, *Voinovich v. Ferguson*, No. 91-1882 (Ohio Supreme Court, filed Sept. 19, 1991) (removed to federal court, remanded to state court, remand stayed, *see Voinovich v. Ferguson*, No. 91-4057 (6th Cir., filed Nov. 26, 1991; California, *Wilson v. March Fong Eu*, No. S022835 (Supreme Court, filed Sept. 6, 1991); Nebraska, *Day v. Nelson*, No. Doc. 472 Page 060 (Dist. Ct. Lancaster County, filed Sept. 6, 1991); and Alaska, *Southeast Conference v. Hickel*, No. 91-1608 (Superior Court, Juneau, filed Sept. 27, 1991).

upon the jurisdiction of the State of Minnesota and its courts.

Congress recognized the limits on federal court authority to enjoin state courts when it enacted the Anti-Injunction Act. 28 U.S.C. § 2283. This Act embodies the constitutional requirement of joint sovereignty which includes a federal government and judiciary with limited powers as found in the Tenth Amendment. U.S. Const. amend. X. The limits on federal power through the Tenth Amendment was acknowledged by this Court as recently as June. *Gregory v. Ashcroft*, 111 S. Ct. 2395, 2399-2402 (1991). The Tenth Amendment is "a recognition of a State's constitutional responsibility for the establishment and operation of its own government." *Id.* (quoting, *Luther v. Borden*, 7 Howard 1, 41 (1849)).

The Minnesota Legislature redraws its legislative and congressional districts every ten years pursuant to the Minnesota Constitution. Art. IV, § 3. While reapportionment involves federal constitutional issues, these issues can be resolved by state courts. *Hines v. Lowrey*, 305 U.S. 85 (1938). When an issue is a state constitutional prerogative, it is controlled by the Tenth Amendment and remains the state's responsibility. *Sugarman v. Dougall*, 413 U.S. 634, 648 (1973). Furthermore, to protect the "Republican Form of Government" guaranteed by the U.S. Constitution, Article IV, § 4, elected state judges should review the apportionment plan passed by the legislature barring any exclusive jurisdiction for the federal court.

As Judge MacLaughlin recognized in his dissent, the Anti-Injunction Act, 28 U.S.C. § 2283, establishes a general prohibition against federal court interference with state court proceedings. App. A-18. The statute provides:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

The federal court apparently recognized that it was constrained by this provision, but deemed that its order was "necessary in aid of its jurisdiction." App. A-11.

The exceptions contained in the Anti-Injunction Act are "narrow and are 'not [to] be enlarged by loose statutory construction.'" *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 146 (1988) (quoting *Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng'rs*, 398 U.S. 281 (1970)). The Act does not convey "a broad general policy for appropriate ad hoc application," but rather is "a clear-cut prohibition qualified only by specifically defined exceptions." *Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng'rs*, 398 U.S. 281, 287 (1970) (quoting *Amalgamated Clothing Workers v. Richman Bros.*, 348 U.S. 511, 515-16 (1955)); *see also Blunt, Ellis & Loewi, Inc. v. Hlavinka*, 896 F.2d 240, 241 (7th Cir.), *cert. denied*, 111 S. Ct. 51 (1990); *United States Steel Corp. Plan for Employee Ins. Benefits v. Musisko*, 885 F.2d 1170, 1176 (3d Cir. 1989), *cert. denied*, 493 U.S. 1074 (1990). If a federal court's power to enjoin a state court action is in doubt, the federal court should not intrude upon the state court's authority. *Atlantic Coast Line R.R.*, 398 U.S. at 297.

The federal court concluded that an injunction of the state court redistricting action was necessary in aid of its jurisdiction because competing judgments might cause "confusion and uncertainty." App. A-11 to A-14. It recognized that the state court's orders might be inconsistent with its orders and held that such a situation should not

continue.[5] Rather than defer to the state court's exercise of concurrent jurisdiction, *see Scott v. Germano*, 381 U.S. 407, 409 (1965), the federal court concluded it was necessary to enjoin the state court.[6] As Judge MacLaughlin pointed out in his dissent, any uncertainty created by the state court's actions cannot be said to interfere with the federal court's exercise of its jurisdiction. App. A-19 to A-20.

The "aid of jurisdiction" exception to the Anti-Injunction Act is extremely narrow. It applies almost exclusively to *in rem* proceedings or to cases where a state court action "would interfere with ongoing federal oversight of a case, such as school desegregation orders." 1A pt. 2 J. MOORE, W. TAGGART, A. VESTAL, J. WICKER & B. RINGLE, MOORE'S FEDERAL PRACTICE ¶ .209[2] at 2340 (2d ed. 1991); *see Garcia v. Bauza-Salas*, 862 F.2d 905, 909 (1st Cir. 1988). This narrow exception does not apply simply because parallel actions are proceeding in both federal and state courts, even where resolution of the matter by both courts would be inconsistent and unworkable. *Atlantic Coast Line R.R.*, 398 U.S. at 295-96; *Phillips v. Chas. Schreiner Bank*, 894 F.2d 127, 132 (5th Cir. 1990); *State of Texas v. United States*, 837

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[5] The risk of inconsistent orders existed from the time the federal action was filed in March 1991. On August 21, 1991, the federal court denied a motion to enjoin the state court action. App. A-37. The federal court has now reversed this holding and issued its injunction in the very late stages of this redistricting litigation without any notice, hearing, or additional briefing.

[6] In enjoining the state court proceeding, the federal court apparently assumed that it had exclusive jurisdiction over challenges under section 2 of the Voting Rights Act, 42 U.S.C. § 1973. App. A-10. This assumption was erroneous, as state courts have concurrent jurisdiction over such claims. *See Hathorn v. Lovorn*, 457 U.S. 255, 269 (1982); *see also Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 477-78 (1981) (concurrent state court jurisdiction presumed absent provision by Congress to the contrary or disabling incompatibility).

F.2d 184, 187 n.4 (5th Cir.), *cert. denied*, 488 U.S. 821 (1988); *Lou v. Belzberg*, 834 F.2d 730, 740 (9th Cir. 1987), *cert. denied*, 485 U.S. 993 (1988).[7]

The federal court lacks authority to enjoin the state court action even where the state court action interferes with the federal action. A federal court "does not have inherent power to enjoin state court proceedings merely because those proceedings interfere with a protected federal right or invade an area pre-empted by federal law, even when the interference is unmistakably clear." *Atlantic Coast Line R.R.*, 398 U.S. at 294. Instead, the issue should be raised in the state court action and that court should determine the limits of its own jurisdiction. *Chick Kam Choo*, 486 U.S. at 149-50 ("[W]hen a state proceeding presents a federal issue, even a pre-emption issue, the proper course is to seek resolution of that issue by the state court.").

The federal court further appeared to hold that its injunction was justified because the state court's actions intruded upon the work of the Minnesota Legislature. App. A-11. However, even if the state court's actions were improper, and the Appellants maintain they were not,[8] the

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[7] The federal court's jurisdiction over redistricting litigation in Minnesota in 1981 and 1982 should not be considered "ongoing federal oversight of a case" which would prevent the Minnesota state court from adjudicating redistricting litigation in Minnesota at this time. All parties recognize that the districts used in the 1980s must be redrawn in response to the 1990 Census. Federal court control of a redistricting action at one time should not preclude state court adjudication of redistricting matters forever thereafter.

[8] The federal court erroneously believed that the state court intended to implement both congressional and legislative redistricting plans before the Minnesota Legislature resumed its session in January 1992. In fact, the state court was waiting until after the Minnesota Legislature reconvened before it even solicited proposed congressional

federal court lacked authority to interfere with that action. *Atlantic Coast Line R.R.*, 398 U.S. at 296 ("[L]ower federal courts possess no power whatever to sit in direct review of state court decisions.") The proper recourse for parties objecting to the state court's action was to appeal to the Minnesota Court of Appeals or directly to the Minnesota Supreme Court. *Id.*[9]

The federal court exceeded its authority in issuing an injunction against the Minnesota state court redistricting action. The federal court's order should be reversed and the injunction should be dissolved.

III. THE FEDERAL COURT'S REFUSAL TO DEFER TO THE STATE COURT ACTION VIOLATES THE DOCTRINE ESTABLISHED IN *SCOTT v. GERMANO*.

The federal court's injunction not only exceeds its authority and violates principles of comity but also contravenes the mandate issued by this court in *Scott v. Germano*, 381 U.S. 407 (1965) (per curiam). In *Germano*, this Court made clear that the exceptional nature of redistricting requires federal courts to defer to state redistricting efforts, including those undertaken by the state judiciary. *Id.* at 409. The Court declared:

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redistricting plans. App. A-278. The state court proceeded with legislative redistricting based on the fact that the Legislature had enacted a law, the impending precinct caucuses, and on the Governor's sworn affidavit that he would veto any bill aimed at merely correcting the technical defects in chapter 246. App. A-277.

[9] The state court indicated in its November 21, 1991 order that it intended to produce an appealable order in early December. App. A-172. In its December 9, 1991 order, the state court did so, and, but for the injunction, the case now is ripe for appeal. App. A-256.

> We believe that the District Court should have stayed its hand. The power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan has not only been recognized by this Court but appropriate actions by the States in such cases has been specifically encouraged.

Id. *Germano* states a broad rule of deference to states and state courts in redistricting matters which extends to the circumstances of this case.

In *Germano*, parallel challenges to the redistricting plans for the Illinois legislature were brought in state and federal court. Before the state court even began to work on a valid redistricting plan, the state defendants asked the federal court to stay its proceedings. The federal court refused to defer to the parallel state proceedings, in part because the federal action had been filed before the state action had reached the merits. *Germano v. Kerner*, 241 F. Supp. 715, 719 (N.D. Ill.), *vacated sub nom. Scott v. Germano*, 381 U.S. 407 (1965). On direct appeal this Court ordered the federal court to stay its hand unless and until it became clear that the state court would be unable to develop a plan before the elections. *Germano*, 381 U.S. at 409-10.[10]

Deference to state redistricting efforts in the case at hand is even more appropriate than the deference called for

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[10] Federal courts have repeatedly recognized the clear abstention requirement set forth in *Germano* and have deferred to parallel state court redistricting actions. *E.g.*, *Bianchi v. Griffing*, 393 F.2d 457, 461 (2d Cir. 1968); *Badham v. March Fong Eu*, 568 F. Supp. 156, 158 (N.D. Cal.), *aff'd sub nom. Badham v. United States Dist. Court*, 721 F.2d 1170 (9th Cir. 1983); *Avens v. Wright*, 320 F. Supp. 677, 686 (W.D. Va. 1970); *Mahoney v. Burkhardt*, 299 F. Supp. 787, 789 (D.N.J. 1969).

in *Germano*. The Minnesota state court has assumed jurisdiction and rendered what would be a final decision but for the federal court stay. Despite the federal court's contentions to the contrary, it is clear that the agencies of Minnesota, including the Supreme Court of Minnesota, will be able to approve a redistricting plan in time for the 1992 elections. The state court action, which was filed before the federal action, has proceeded rapidly. The state court completed its substantive work in late November and was prepared to issue a redistricting order to allow for appellate review before the Spring of 1992. The federal court's injunction, however, disrupted the timely and orderly operation of Minnesota's judicial system, stopping it in its tracks.

This Court has expressed its approval of state court review of legislative redistricting plans:

> We applaud the willingness of state courts to assume jurisdiction and render decision in cases involving challenges to state legislative apportionment schemes.

Maryland Comm. for Fair Representation v. Tawes, 377 U.S. 656, 674 (1964). The Court also cited a Kansas Supreme Court redistricting decision as a "commendable example of an exercise of judicial responsibility by a state court." *Id.* at 674 n.18 (citing *Harris v. Shanahan*, 192 Kan. 183, 387 P.2d 771 (1963)).

The federal court disagrees with appellants about the meaning of *Germano*. According to the federal court the deference required under *Germano* is owed to state legislatures but not to state courts. The holding in that case, however, is not so limited. In *Germano*, this Court established that federal courts should defer to state courts in redistricting matters. In the case at hand the Legislature

enacted a redistricting plan in May 1991, and the plan was challenged and reviewed by the state court. In either situation the rule is the same: The state court must be given an opportunity to formulate and approve valid redistricting plans without interference from the federal courts. *See, e.g.*, 17A C. WRIGHT, A. MILLER, & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4247, at 127.

No one disputes that redistricting is essentially a legislative function and that the judiciary, both state and federal, should give appropriate deference to the Legislature. What is at issue here, however, is the proper relation between our state and federal courts. This Court has emphasized that the federal courts must give the utmost deference to the state courts where redistricting matters are at stake. The federal court has not only refused to defer to the courts of Minnesota, it has prevented the state court from carrying out the very role this Court has encouraged state courts to undertake. The federal court's order violates the important principle established by this Court in *Scott v. Germano* and should be vacated.

IV. THE STAY IS NOT AUTHORIZED BY 28 U.S.C. § 1651(a).

The federal court based its *sua sponte* stay of all state court proceedings on the *All Writs Act*, 28 U.S.C. § 1651(a). That Act has no application to the present case. It provides:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

The Act permits a federal court to issue writs to

protect its own judgments or its own orders. *See, e.g., Pennsylvania Bureau of Correction v. United States Marshals Serv.*, 474 U.S. 34, 40-43 (1985); *Cook v. Peter Kiewit Sons Co.*, 775 F.2d 1030, 1035-36 (9th Cir. 1985), *cert. denied*, 476 U.S. 1183 (1986). The purpose and office of the Act is to protect already issued judgments or orders about to be issued. *Baker v. Gotz*, 415 F. Supp. 1243, 1247 (D. Del.), *aff'd* 546 F.2d 415 (3d Cir. 1976); *see, e.g., Toledo Scale Co. V. Computing Scale Co.*, 261 U.S. 399, 426 (1923). The phrase "in aid of" does not vest or create a general restraining power in the federal courts. *Cook*, 775 F.2d at 1035.

The federal court's issuance of an injunction to "protect its jurisdiction" before it has rendered a judgment is inconsistent with the rule permitting parallel proceedings in concurrent *in personam* actions. *See Laker Airways v. Sabena, Belgian World Airlines*, 731 F.2d 909, 928-29 (D.C. Cir. 1984).

As this Court stated in *Kline v. Burke Construction Co.*, 260 U.S. 226, 230 (1922):

> [A] controversy is not a thing, and a controversy over a mere question of personal liability does not involve the possession or control of a thing, and an action brought to enforce such a liability does not tend to impair or defeat the jurisdiction of the court in which a prior action for the same cause is pending. Each court is free to proceed in its own way and in its own time, without reference to the proceedings in the other court. Whenever a judgment is rendered in one of the courts and pleaded in the other, the effect of that judgment is to be determined by the application of the principles of res judicata by

> the court in which the action is still pending in the orderly exercise of its jurisdiction, as it would determine any other question of fact or law arising in the progress of the case. The rule, therefore, has become generally established that where the action first brought is in personam and seeks only a personal judgment, another action for the same cause in another jurisdiction is not precluded.

In reversing the issuance of an injunction granted under the All Writs Act, the Court in *Kline v. Burke Construction Co.* quoted with approval from *Baltimore & Ohio R.R. v. Wabash R.R. Co.*, 119 Fed. 678, 680-81 (7th Cir. 1902), *cert. denied*, 187 U.S. 650 (1903), as follows:

> It is settled that, when a state court and a court of the United States may each take jurisdiction of a matter, the tribunal whose jurisdiction first attaches holds it, to the exclusion of the other, until its duty is fully performed, and the jurisdiction involved is exhausted. . . . The rule is not only one of comity, to prevent unseemly conflicts between courts whose jurisdiction embraces the same subject and persons, but between state courts and those of the United States it is something more. 'It is a principle of right and law, and therefore of necessity. It leaves nothing to discretion or mere convenience.'

260 U.S. at 231.

This is not a case where federal court judgment has been entered and the state court seeks to prevent the enforcement of the judgment. *See, e.g., Travia v. Lomenzo*, 381 U.S. 431 (1965). In this case, the state court acquired

jurisdiction first, held five hearings, undertook painstaking and detailed review of chapter 246, and was about to reach final judgment when the federal court acted.

In this case there was no need for injunctive relief to protect the federal court's jurisdiction. To the extent that the federal court has jurisdiction over the subject matter of state legislative redistricting, that jurisdiction is concurrent with that of the Minnesota state courts. *See Scott v. Germano*, 381 U.S. 407 (1965) (per curiam). Concurrent federal jurisdiction will not disappear based upon any state court order. On the other hand, granting an injunction against completion of the state court's work defeats the very concept of concurrent jurisdiction.

Issuance of an injunction below was not "agreeable to the uses and principles of law." 28 U.S.C. § 1651(a). It is not agreeable to the principles of comity or federalism. It is not agreeable to the principle set forth in *Scott v. Germano*, 381 U.S. at 409. It is not agreeable to the concept of concurrent jurisdiction. It does not even permit the Minnesota Supreme Court to review the judgment of its Special Redistricting Panel. The injunction granted below is not only unlawful, it is also disrespectful to the Minnesota Supreme Court in not allowing it to review the state court judgment.

The order issued by the district court is premised on the conclusion that the Minnesota state court's decision could not possibly be reviewed by the state Supreme Court in time to be in place by early February. App. A-12. There is no basis in the record or otherwise for this conclusion. The dissenting judge below, a former member of the Minnesota Supreme Court, agrees that, but for the injunction, the Minnesota Supreme Court would have ample time for its appellate review. App. A-18. Furthermore, any final judgment of the federal court would likewise be subject to

appeal, a process that would not begin until February 1992 at the earliest.

The Minnesota State Court decision does not seek to interfere with or impede the imposition or effectuation of any federal court plan. None has been promulgated. Even if such a federal plan had been promulgated, the "principle of federalism" to which the court below gave only lip service, App. A-12, would require that the federal court stay its hand until the "appropriate agencies of the State of [Minnesota], including its Supreme Court, may validly redistrict . . ." *Scott v. Germano*, 381 U.S. at 409. In this case, the injunctive order of the District Court should be vacated and the case remanded with instructions that the District Court retain jurisdiction pending legislative action by the Minnesota Legislature or by the Minnesota Supreme Court on or before February 28, 1992. *See Scranton v. Drew*, 379 U.S. 40 (1964); *Maryland Committee for Fair Representation v. Tawes*, 377 U.S. 656, 674 (1964).

CONCLUSION

This injunction affects, not only a state court in Minnesota, but state courts throughout the country that are just beginning the 1990's round of redistricting. If this injunction is allowed to stand, it will discourage all state courts from becoming involved in redistricting and throw the entire burden on the federal courts. Every appeal of a district court decision will go straight to this Court, bypassing the State's own highest court. This is completely at odds with this Court's oft-repeated concern for the role of state courts in our federal system. The injunction should be vacated forthwith. Therefore, Appellants respectfully request this Court to note probable jurisdiction and to hear this appeal on an expedited basis.

DATED: December ___, 1991
Respectfully submitted,

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